U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date Issued: September 7, 1999

Case No.: 1999-INA-193

In the Matter of:

DULLES AIRPORT DAYS INN ,
Employer,

on behalf of

ERIC TING-YUE CHAN,
Alien.

Certifying Officer: Richard E. Panati
Philadelphia, PA

Appearance: Pearl C. Lai, Esq.
Monroeville, PA

Before: Burke, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam: This case arises from an application for labor certification[1] filed by a Hotel for the position of Accountant/Income Auditor. (AF 49-50).[2]

The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. §656.27(c).

STATEMENT OF THE CASE

On August 20, 1997, Days Inn Dulles Airport filed an application for alien employment

[1]Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2]"AF" is an abbreviation for "Appeal File."

certification on behalf of the Alien, Eric Chan, to fill the position of Accountant/Income Auditor. Minimum requirements for the job were listed as a Bachelor of Science in Accounting and one year experience.[3] Employer received four applicant referrals in response to its recruitment efforts, all of whom were rejected for the position (AF 14-16).

A Notice of Finding (NOF) was issued by the CO on February 23, 1999, proposing to deny labor certification based upon a finding of unlawful rejection of U.S. workers. Citing Employer's requirement that U.S. applicants provide copies of their degree plus transcript and ALL reference letters reflecting accounting work experience within ten days, the CO concluded this request was excessive and unreasonable and likely had a chilling effect on the continued interest of U.S. applicants in the position. The CO stressed that the burden of proof is on the employer to show that U.S. workers are not able, willing, qualified or available for the job. (AF 10-11).

In Rebuttal, Employer stated that requiring such information of the applicants was a typical action by Employer and that the time period was used to screen out those no longer interested. Employer cited the fact that one applicant responded within the time period provided, which "shows I allowed a reasonable response time for the applicants" and further stated that applicants were free to request more time if needed. Employer stated that one applicant was disqualified on the basis of his qualifications and the remaining three because they were not interested in the job. (AF 6-8).

A Final Determination denying labor certification was issued by the CO on March 19, 1999. (AF 5-5A). The CO concluded Employer had failed to provide lawful job-related reasons for rejection of the U.S. workers referred. The CO stated that the request for the documents in the timeframe provided was unreasonable on its face and that the offer of additional time to provide documents was never communicated to the applicants. Citing that fact that at least one applicant failed to pursue the job opportunity after receiving Employer's letter, the CO observed that the lack of response appeared directly related to Employer's unreasonable demand. In response, Employer filed a Request for Administrative-Judicial Review on April 12, 1999 and filed an Appeal Brief on May 14, 1999. (AF 1-3).

DISCUSSION

Federal regulations at 20 C.F.R. 656.21(b)(6) state that the employer is required to document that if U.S. workers applied for the job opportunity, they were rejected solely for lawful job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. workers. This regulation applies not only to an employer's formal rejection of an applicant, but also to a rejection which occurs because of actions taken by the employer.

The Board has repeatedly held that where an applicant's resume raises a reasonable possibility that he/she is qualified for the job, an employer bears the burden of further investigating the applicant's credentials. *See, i.e. Ceylion Shipping, Inc.*, 1992-INA-322 (Aug. 30, 1993);

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3 With its application, Employer submitted the results of its recruitment and rejection of 17 applicants along with a request for reduction of recruitment, which was denied. (AF 40-46).

Executive Protective Serv., Inc., 1992-INA-392 (July 30, 1993); *Messina Music, Inc.*, 1992-INA-357 (July 20, 1993); *M.S.O. Dev. Corp.*, 1992-INA-326 (July 30, 1993). The employer's responsibility to investigate can be accomplished by interview or other reasonable means. Under certain circumstances, such other means may include sending the applicant a written request for clarifying information. However, whatever means are utilized by the employer, they may not place unnecessary burdens on the recruitment process, be dilatory in nature, or otherwise have the effect of discouraging U.S. applicants from pursuing the job opportunity. *Ryan, Inc.*, 1994-INA-606 (Sept. 12, 1995)(holding that employer failed to recruit workers in good faith where it sent follow-up letters to applicants requiring the applicants to submit excessive information).

In the instant case, we conclude that Employer failed to recruit workers in good faith. Requiring that an applicant provide copies of his or her degree, transcript and all reference letters before being interviewed, and in a ten-day time period, had a chilling effect, which discouraged U.S. applicants from continuing to pursue this position. The request is unreasonable on its face, and in fact at least one applicant failed to pursue the job opportunity after receiving Employer's letter. The burden of proof is on the employer to show that U.S. workers are not able, willing, qualified or available for this job opportunity. Employer failed to do so, and accordingly, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

SO ORDERED.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.